

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO.150 OF 2005
IN
COMPANY APPLICATION (LODGING) NO.172 OF 2005
IN
COMPANY APPLICATION NO.461 OF 2003

S.Kumars Nationwide Ltd. Appellant

V/s.

Morgan Securities and Credits Pvt.Ltd. Respondents

Mr.J.D. Dwarkadas with Mrs.M.S. Divan i/b M/s.
Little & Co. for the petitioners.

Mr.P.K. Samdani i/b N.K.Madnani & Co. for the
respondents.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 15TH APRIL, 2005.

P.C. :

1. This is an appeal against the order of the learned single Judge rejecting the appellants application for ad-interim reliefs. By consent the appeal is admitted and heard finally. It is also agreed by the parties that the order passed by us shall be considered as the final order on the company application itself.

2. The Appellant filed the above company

application for a declaration that it has duly paid to the respondent the full amount as provided in the consent terms dated the 9th December, 2003 and that no further amount is due and payable by the appellant to the respondent. The appellant has also sought an order directing the respondent to withdraw all the proceedings initiated by the respondent against the Appellant, its directors and officers as provided under the said consent terms.

3. The appellants presented a scheme of compromise under section 391 of the Companies Act for settling the liabilities of certain creditors including the respondents. The respondents however opposed the scheme and insisted on not being covered by it. For the purpose of this order it is not necessary to deal with the proceedings between the parties in this regard. The disputes between the parties were also referred to arbitration and an interim award dated the 12th August, 2003 was obtained by the respondent against the appellant. It is not necessary for us to deal with the disputes between the parties in any further detail either as the same were finally settled in terms of consent terms dated 9th December 2003 the terms whereof fall for consideration in this appeal.

4. Under the consent terms it was agreed that an amount of Rs.2,25,00,000/- was payable by the appellant to the respondent as on 31st December, 2003. It is the admitted position that the entire amount including interest has been paid by the appellant to the respondent. There was a slight delay in the payment of one of the instalments for which the appellant in fact paid interest and the respondent received the same. The respondent's main contention is that though it has received the entire amount payable under the consent terms, in view of the delay in the payment of one of the instalments, albeit only of a few days, it is entitled to retain the entire amount of Rs.2,25,00,000/-, avoid the consent terms and prosecute its original claim. The respondents stand is not only unjust and inequitable but, as we shall presently demonstrate, unsustainable. The respondent ultimately, though not immediately on the default, not merely acquiesced in the delay in the payment of the said instalment but accepted the final instalment which was paid in time, in full and final satisfaction of all its claims and impliedly, if not expressly, agreed to abide by the consent terms itself.

5. The consent terms read as under :-
 1. "Amount payable by M/s.S. Kumars Nationwide Ltd. being Rs.2.25 crores as on 31st December, 2003 to Morgan Securities and Credits Private Limited.
 2. First instalment of Rs.15 lacks to be paid by S. Kumars Nationwide Ltd. on 31.1.2004.
 3. Second instalment of 105 lakhs to be paid by S. Kumars Nationwide Ltd. on 30.6.2004.
 4. Third instalment of 105 lakhs to be paid by S. Kumars Nationwide Ltd. on 31.12.2004.
 5. Interest at the rate of 11% per annum on reducing balance w.e.f. 31.12.2003, payable quarterly i.e. on 31.3.2004, 30.6.2004, 30.9.2004 and 31.12.2004.
 6. The above settlement shall be outside the ambit of scheme of compromise/arrangement being proposed by S. Kumars Nationwide Ltd. under section 391 of the Companies Act 1956 and the Applicant (Morgan Securities and

Credits Private Limited) shall not be included in the scheme under section 391 of the Companies Act, 1956 proposed by S. Kumars Nationwide Ltd presently or in future.

7. This settlement is without prejudice to the interim award dated 12th August, 2003 which, however, shall stand satisfied if the payment is made by S. Kumars Nationwide Ltd. in accordance with payment schedule as mentioned hereinabove and shall also not prejudice the rights of the Applicants (Morgan Securities and Credits Private Limited) in case of default.
8. The proceedings initiated by the Applicants against M/s.S. Kumars Nationwide Ltd its Directors and Officers and against the personal guarantor Mr.Nitin Kasliwal shall not be withdrawn till the time full payment is made in accordance with this arrangement and shall be in abeyance till the time there is no default in payments as stated hereinabove.
9. In view of the above the parties withdraw all

allegations made against each other."

6. The first instalment of Rs.15 lakhs was paid on the due date. The last instalment of Rs.105 lakhs was also paid on the due date. The manner and circumstances in which the third instalment was paid by the appellant and received by the respondent is important and we shall deal with the same later. The only instalment in respect whereof it is alleged that there was a delay is the second instalment.

7. The second instalment of Rs.105 lacks was payable on 30.6.2004. The appellant by a letter dated 25th June, 2004 requested the respondent for 15 days time to make payment of this instalment. The respondent by its letter dated 20th June 2004 refused the request. The appellant therefore paid Rs.80 lacks on 5th July 2004 and the balance amount of Rs.25 lacks on 13th July 2004. Thus there was the delay of five days in the payment of Rs.80 lacks and a delay of 14 days in the payment of Rs.25 lakhs in respect of the second instalment. The appellant admittedly paid interest for this delay in addition to the other interest payable under the said consent terms.

8. Thus the respondent has not suffered in any

manner whatsoever. Even for this mere delay of five days in the payment of Rs.80 lacks and 14 days in the payment of Rs.25 lakhs the respondent has received interest. Had the matter ended here the respondent may nevertheless have been entitled to its pound of flesh it claims today arising from the appellants delay in the payment of the second instalment. But the matter did not end here. The manner in which the third instalment was paid by the appellant and received by the respondent and the respondent's subsequent stand is important.

9. The appellant by its letter dated 30th December 2004 requested time up to 15th January 2005 to make payment of the third instalment of Rs.105 lakhs together with interest. The respondent by its fax message dated 31st December, 2004 stated that : "the relationship between us is and shall be governed in terms of the order dated 9th December 2003." The respondent further stated that it hoped that the appellant would comply with the order dated 9th December, 2003 and in case of breach on the part of the appellant the respondent would be constrained to take appropriate steps. Thus impliedly the respondent confirmed that it considered itself continued to be bound by the said order dated 9th December, 2003 and

waived the delay in the payment of the second instalment and its rights as a result thereof. For if that was not so there was no question of the respondent stating that even it is and shall be governed by the said consent terms and further there would have been no question of the respondent stating that the delay in the payment of the third instalment would be considered as a breach and that the respondent would be constrained to take appropriate steps. Had the respondent considered itself not bound by the consent order dated 9th December, 2003 as a result of the delay in the payment of the second instalment it would already have been entitled "to take appropriate steps" irrespective of whether or not there was a breach in the payment of the third instalment.

10. What is even more important in this regard is that as a result of the respondents refusal to extend the time by 15 days for the payment of the third instalment the appellant made payment thereof in time i.e. on 31st of December, 2004. Under cover of its letter dated 31st December, 2004 the appellant made payment of Rs.105 lakhs towards principal and a further sum towards interest. What followed in the letter and the respondents reply thereto is crucial.

The appellants fax/letter reads as under :-

"As per the aforesaid consent terms we have complied in meeting our obligation towards your ICD liability. As agreed on realisation of the cheques you should withdraw all the legal proceedings initiated by you against us including the execution proceedings filed by you in Delhi High Court, criminal complaint filed in Gaziabad Court and all other legal proceedings filed by you against our company in any court of Law, Tribunal, Arbitrator."

11. the respondent by its letter dated 31st December, 2004 acknowledge the receipt of the appellants letter along with the cheques and stated : "This acknowledgement is subjected to realisation". The respondent did not, while accepting the entire balance amount refute what was stated in the appellant's letter dated 31 Dec 2004 extracted above. Had the respondent not waived the breach and consider itself not bound by the consent terms as now contended before us, we would have expected them to have responded denying their liability to withdraw all legal proceedings initiated by them against the appellant including the execution proceedings,

criminal complaints and other proceedings pending before any other courts, tribunals, or arbitrators. The respondents thus clearly accepted the fact that they consider themselves bound by the consent terms despite the aforesaid delay in the payment of the second instalment by the appellant.

12. Despite the above position the respondent apparently filed an application in the Delhi High Court contending that the appellant had breached the consent terms. The appellants therefore filed the present Company Application.

13. Mr.Samdani, the learned counsel appearing on behalf of the respondent, contended that the respondent accepted the payment of the second instalment without prejudice to their rights and contentions under the consent terms. He relied upon a letter dated 6th July 2004 addressed by the respondent to the appellant reiterating what was stated by the respondent in its letter dated 28th June, 2004. In the letter dated 28th June, 2004 the respondent had refused the appellants request for an extension of time for the payment of the second instalment and reserved its rights under the consent terms. We have already discussed the manner in which the appellant

paid the third instalment and more important, the manner in which the respondent accepted the same by its letter dated 31st December, 2004.

. It is however also important to note that after the said letters dated the 28th June, 2004 and 6th July, 2004 the respondent addressed two further letters dated 27th October, 2004 and 20th November, 2004 in which the respondent stated : "Further, the relationship between us is governed in terms of the order dated 9 Dec 2003 passed by Hon Bombay High Court." It is thus clear beyond doubt that the respondent considered not merely the appellant but also itself bound by the said consent terms. The use of the word "us" makes this clear. In our view therefore not merely the appellant but even the respondents are bound by the terms of the said order.

14. It is true that under clause 7 of the consent terms the interim award was to stand satisfied if the payment was made in accordance with the schedule mentioned therein and that the settlement was not to prejudice the rights of the respondent in case of default. This clause by no stretch of imagination reopens all the disputes and differences between the parties in the case of default other than those

related to the interim award.

15. Mr.Samdani placed particular emphasis on clause 8 of the consent terms in support of his contention that the proceedings filed by the respondent against the appellant were not required to be withdrawn as the payment was not made in accordance with the terms thereof. We have already held that the aforesaid delay in the payment of the second instalment was acquiesced in by the respondent. Further, as observed by us earlier, thereafter the respondent considered not merely the appellant but also itself bound by the consent terms. There was a complete accord and satisfaction of the respondents claims against the appellant. In the circumstances it must be held that the entire claim of the respondent under the consent terms stood satisfied and that the respondent duly paid the full amount thereunder in full and final satisfaction of all the claims of the respondents.

16. The learned judge held that the consent terms do not provide for either abandoning the arbitration proceedings for the balance claim or not to initiate any proceedings whatsoever for the remaining claim. The claim before the arbitrator was for

Rs.2,91,00,000/- . In fairness we must state that the learned single Judge has qualified his observations by stating that he was only prima-facie unable to accept the appellants contention at the ad-interim stage. We are, with respect, unable to agree with the learned Judge that the consent terms permit the respondents to proceed in respect of the balance claim made before the learned arbitrators. Mr.Samdani also submitted that the consent terms were only in respect of the respondents claim under the interim award. In fairness to Mr.Samdani we must state that he fairly did not press this point seriously. The submission is in any event totally unfounded for more than one reason.

17. Firstly clause 1 of the consent terms clearly states that the amount payable by the appellant to the respondent is Rs 2,25,00,000/- . The clause does not state that the amount is as per the interim award. In fact none of the clauses in the consent terms even remotely indicate that the settlement was confined only to the interim award. Moreover clause 8 clearly establishes the contrary. If the settlement was confined only to the interim award there would have been no question of keeping all other proceedings in abeyance till the time there was no default in the

payment of the amounts under the consent terms. Further nowhere in the correspondence has the respondent contended that the payments received by them from the appellants under the consent terms pertained only to the interim award. This is despite the fact that while making payment of the third instalment the appellant stated that it had complied in meeting its obligation towards the ICD and not merely towards of the interim award. The doubt if any is removed by the receipt executed by the respondent in respect of the first instalment. The respondents acknowledged therein receipt of the said amount "as per the settlement done in the Hon Bombay High Court for amount outstanding towards Inter Corporate Deposit" (emphasis supplied) and not towards the interim award.

18. If we are correct in the view that we have taken above it is not necessary to consider prayer (b) at this stage. It will be open to the appellant to make an appropriate application before the concerned Court, tribunal or arbitrator, as the case may be, for appropriate directions in accordance with this judgement. The appellant shall have liberty to apply in this regard if necessary.

19. In view of the judgement of the Division Bench of this court (B.N.Srikrishna J- as his Lordship then was - and S.A.Bobde J.) in Re: Nilesch Lalit Parekh, (2002) 1 Bom. C.R. 357, the appellants entitlement to the reliefs claimed at least so far as prayer (a) is concerned was not and cannot be disputed.

20. In the circumstances the appeal is allowed. The order of the learned single Judge is set aside. The above Company Application is made absolute in terms of prayer (a) with liberty to the appellant as aforesaid in respect of prayer (b). There shall however be no order as to costs.